LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 8 1965
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 622

PACIFIC COAST EUROPEAN CONFERENCE, PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, and their Respective Member Lines,

Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

GRAHAM JAMES & ROLPH
LEONARD G. JAMES
ROBERT L. HARMON
F. CONGER FAWCETT
310 Sansome Street
San Francisco, California 94104
Attorneys for Petitioners

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

INDEX

	Page
Introduction	1
1. The Substance of the Commission's "Uniform Contract"	4
2. The Extent of Permissible Action Under Subsection 14b(9)	5
3. Rule-Making, Adjudication, and the Administrative Procedure Act	7
4. Svenska	10
Conclusion	11

CITATIONS

Cases

	Pages
Aktiebolaget Svenska Amerika Linien (Swedish-America Line) v. Federal Maritime Commission, D.C.Cir. No. 18544 (June 10, 1965)	10
Burlington Truck Lines v. United States, 371 U.S. 156 (1962)	6, 8
Federal Communications Commission v. RCA Communications, 346 U.S. 86 (1953)	6
Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958)	6
National Labor Relations Board v. Metropolitan Life Insurance Co., 380 U.S. 483 (1965)	8
S.E.C. v. Chenery Corp., 332 U.S. 194 (1947)	8
United States v. Morton Salt Co., 338 U.S. 632 (1950)	2
Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)	10

Statutes

Administrative Procedure Act, 5 U.S.C. §§1001 et seq.	passim
Public Law 87-346, 75 Stat. 762 et seq.	3
Shipping Act, 1916, 46 U.S.C. §§801 et seq.	passim

Miscellaneous

Attorney General's Manual on the Administrative Procedure Act (1947), pp. 5-7	10
Congressional Record	3
H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961), pp. 12-13	3
Sen. Rep. No. 860, 87th Cong., 1st Sess. (1961), pp. 14-15	5, 10
5 S.R.R. 289 (FMC 1964)	3
5 S.R.R. 529, 532 (FMC 1964)	3
6 S.R.R. 498, 504 (1965)	3

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 622

PACIFIC COAST EUROPEAN CONFERENCE, PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, and their Respective Member Lines,

Petitioners,

vs.

UNITED STATES OF AMERICA and FEDERAL MARITIME COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

INTRODUCTION

The short Brief in Opposition to the grant of certiorari requested by petitioners herein, filed by the Solicitor General and the respondent Federal Maritime Commission, treats the matter before the Court as an insignifi-

cant bit of trivia and, glossing over petitioners' specific questions and objections, attempts to dismiss the gravity of the proceeding with two unfocused, generalized "questions presented" which, as stated, do not even begin to approach the issues actually involved.

The issues which *are* involved are of overwhelming significance to a vast segment of United States industry, involving as they do novel and precedent-shattering interpretations of two great statutes:

(a) The Shipping Act, 1916—the regulatory statute which governs all ocean shipping to and from the United States, and

(b) The Administrative Procedure Act—the statute which governs the procedures of not only this particular regulatory agency but of nearly every other administrative agency of the United States.

The latter Act, once hailed by this Court as a landmark enactment "creat[ing] safeguards, even narrower than the constitutional ones, against *arbitrary official encroachment on private rights,*"[1] has literally been disemboweled by the opinion of the Court below, and here fights for its very life: If the slippery and easy non-observance of the Administrative Procedure Act sanctioned (indeed, in large measure created) by the Court below passes uncorrected by this Court, it will indeed be as effectively dead as if by direct Congressional repeal.

The future administration of the Shipping Act, too, hangs in the balance. Substantively, and specifically con-

---

[1] *United States v. Morton Salt Co.*, 338 U.S. 632, 664 (1950) (supplying emphasis).

cerning the Section directly involved, the new Section 14b, the respondent Commission has clearly and flatly announced that, henceforth, new applications to institute "dual rate" systems, and requests for modifications of old systems, will be measured and governed, not by Section 14b, but wholly by the omnibus "Dual Rate Cases" report.[2] Procedurally, and notwithstanding the government's purported distinction (see *infra*, heading 4), the future administration of the keystone Section 15, as well as 14b, is even more gravely jeopardized: If an "order, after notice and hearing" is held (as here it has been) to authorize off-the-record rulemaking in the one instance, logically it must also be so in the other—entirely contrary to an unbroken half-century of administrative and judicial interpretation.

Finally, before turning to a brief analysis of the Solicitor General's several arguments, it is well to bear in mind the unfavorable predisposition of the Department of Justice toward the whole "dual rate contract" concept. Having joined in opposing such a system in *Isbrandtsen*,[3] the Department of Justice, virtually alone among the many concerned federal agencies, worked vigorously for the defeat or severe crippling of the enabling Public Law 87-346, and, indeed, was one of the earliest, staunchest proponents of a "mandatory, uniform contract."[4] The

---

[2]See, e.g., 5 S.R.R. 289 (F.M.C. 1964); 5 S.R.R. 529, 532 (F.M.C. 1964); 6 S.R.R. 498, 504 (Initial Decision, 1965).

[3]*Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

[4]See H.R.Rep. No. 498, 87th Cong., 1st Sess., pp. 12-13 (1961); Sen. Rep. No. 860, 87th Cong., 1st Sess., pp. 2, 11-14, 21, 30-37 (1961); and countless pages of the Congressional Record, too numerous to list here.

Department continues its active opposition to any workable contract system in this very case, in the Court below and now before this Court.

---

1. THE SUBSTANCE OF THE COMMISSION'S "UNIFORM CONTRACT"

The Solicitor General's assertion that "petitioners in effect [whatever that means] abandoned any claim of inconsistency" [p. 6] is as thoroughly false as the argument which proceeds from it. Petitioners devoted nearly one-third of their opening brief and a full one-half of their reply brief, in the Court below, to a *particularized, clause-by-clause* examination of some of the more objectionable of the almost countless inadequacies and inconsistencies of the Commission's "uniform contract", measured against the terms of the statute. Why the Court below chose (as admittedly it did) to ignore all of this painstaking detail of "the substance of the contracts," in its final decision, is perhaps best explained by the self-evidently hostile attitude of that Court, to which its entire incredible opinion bears witness. That the Court so casually sloughed off petitioners' squarely presented argument, however, is no excuse for the government's now contending that the argument was never made! At least those on brief with the Solicitor General, who participated in the proceedings below, know better.

No more fair, or accurate, is the government's suggestion that, on petition here, petitioners "continue to refrain" from specificity. The obvious space limitations of an

already crowded petition have manifestly precluded any such provision-by-provision analysis, at this threshold point; again, however, this is no justification for the assertion that such analysis was not made, will not be made, or has been "abandoned"—"in effect" or otherwise. The charge is unjust and groundless.

---

2. THE EXTENT OF PERMISSIBLE ACTION UNDER SUBSECTION 14b(9)

As should be clear from our petition itself, we do not, of course, maintain that "Congress intended no implementation of the statutory standard" by and through the catch-all 14b(9), as the government's brief unjustly advises the Court [p. 8]. We of course do not deny the existence of the subsection.

What we do most emphatically deny, however, is that the Commission was, thereby, empowered not only to add page upon page of mandatory provisions on "other matters than those occurring to Congress"[5] but, as well, to revise and rewrite completely *every one* of the provisions which *did* "occur to Congress"! As implemented by the Commission, and chaotically sustained by the Court of Appeals, subsection 14b(9) did not "implement" the rest of Section 14b; it *ousted and supplanted* it![6]

---

[5]Opinion of the Court below, App. B, p. 8; 350 F.2d at 203.

[6]The very language of the subsection itself, of course, indicates that its subject matter was to be *"other* provisions" than the Congressionally-enumerated eight which precede it. See also Sen. Rep. No. 860, 87th Cong., 1st Sess., 14-15 (1961).

What we do emphatically maintain is that the subsection was not—as constitutionally it could not be—intended as *carte blanche* authority for wholesale agency "legislation," circumscribed only by Commission whim and "desirability". This Court has in the past been quick and unequivocal in curbing this sort of freewheeling agency discretion, stating:

> "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Burlington Truck Lines v. United States,* 371 U.S. 156, 167 (1962); *Federal Communications Commission v. RCA Communications,* 346 U.S. 86, 90 (1953).

Finally, what we maintain is that, in the context of the section of which it is a part, subsection 14b(9) could legitimately be used to "require" (as opposed to "permit") additional clauses *only* when and where a deficiency, necessitating such correction, was actually *found,* on *record evidence,* to exist.[7] Otherwise the entire scheme of the section, requiring an "order", "after notice, and hearing," becomes meaningless, a pointless ritual—to borrow the words of Mr. Justice Frankfurter in the progenitor of the instant case, "a carnival of procedural emptiness."[8]

---

[7]The dissenting Commissioner Patterson so recognized; see, e.g., Supp. App. 184-185, 187.

[8]*Federal Maritime Board v. Isbrandtsen Co.,* 356 U.S. at 518 (1958) (dissenting opinion).

3. RULE-MAKING, ADJUDICATION, AND THE ADMINISTRATIVE PROCEDURE ACT

In fact, however, it is just such a "carnival of procedural emptiness" which the Court below created, and the Solicitor General seeks here to defend, in holding the Commission's action to have been permissible rule-making, legitimately achieved. Assuming, *arguendo*, that the Commission was so permitted to proceed, and notwithstanding the fact that its final action had all *appearances* of rule-making, the indisputable *fact* remains that the Commission itself *purported* to be *adjudicating*, in "The Dual Rate Cases" report: it repeatedly refers to its action as a "decision" [e.g., Supp. App. 126, 129], speaks of "findings" [Supp. App. 176, 180], and, ultimately, enters orders ostensibly of "approval" [Supp. App. 119, 126]; moreover, in attempting to implement (albeit arbitrarily) the bewildering "order of remand" of the Court, the Commission again entered final "orders of approval" [Supp. App. 257-258, 271-273] *as well as* a "notice of proposed rule-making" [Supp. App. 288-289], all simultaneously!

The first error, of both Court and Solicitor General, then, is one of *fact:* Whether or not the Commission was *authorized* to proceed by way of general rule, in "The Dual Rate Cases" it *was not* purporting to do so. As Commissioner Patterson correctly observed, it only turned out to *look* that way—but without Commission acknowledgment of it.[9] Assuming this discretionary authority, the Court below nevertheless erred in upholding the Commis-

[9] Supp. App. 185-186.

sion's action as rule-making, since as this Court has stated:

> "Chenery[10] requires that an agency's discretionary order be upheld, if at all, on the *same basis articulated in the order* by the agency itself." *Burlington Truck Lines, supra,* at 168-169; *N.L.R.B. v. Metropolitan Life Insurance Co.,* 380 U.S. 483 (1965) (emphasis and footnote supplied).

The second base point of error, committed by the Court and compounded by the Solicitor General, is in their complete ignorance of the Administrative Procedure Act. Assuming, again, that Congress *did* intend the Commission to create a "uniform" contract[11] by way of rule, still—by the lower Court's amazingly candid admission—the Commission did not in any fashion follow that Act's requirements for rulemaking. Commissioner Patterson's comment, alone against Commission, appellate Court, and high counsel, gives the lie to all of their glib rationalizations:

> "There is no doubt that Congress intended that we should establish standards for dual-rate contracts and that we would be expected to provide a standard form of contract which all conferences might utilize, as the majority says. I am confident that it was equally expected that we would observe existing laws governing procedures to be followed in achieving the intended results. The assertion of an expectation by a Congressional Committee does not justify abandonment of existing prescriptions of law. Congressional

---

[10] *S.E.C. v. Chenery Corp.,* 332 U.S. 194 (1947).

[11] Of permissible, rather than compulsory, use, perhaps—as Commissioner Patterson suggested (see text), "a standard form of contract which all conferences *might* utilize."

> expectations are not enough to repeal Sec. 4 of the Administrative Procedure Act in regard to these contracts . . . .
>
> "The desirability of uniform results is assigned as a reason for compulsory rule-made provisions. Desirability, however, is no substitute for statutory compulsion. The majority has committed a fatal error in not complying with the Administrative Procedure Act." [Supp. App. 187-188].

The Solicitor General compounds his disdain for the Administrative Procedure Act in urging upon this Court the bizarre and totally inadequate theory of "relief" for petitioners which the lower Court, in its ingenuity, created. Notwithstanding the appellate Court's acknowledgment that, "The deficiency here [in the Commission's "rule-making"] was in *failure to give any notice whatsoever,*"[12] the Solicitor General, like that Court, professes to believe that "participation" in adjudication *ipso facto* equals "participation in the making of [a] rule" and that, accordingly, "Petitioners have no real cause for complaint" [p. 9].

There is something deeply and fundamentally wrong in this approach. No one can honestly read the lower Court's opinion without experiencing some degree of amazement at the step-by-step dismemberment of the Administrative Procedure Act and the orderly process of administrative law, as that Court bootstraps and strains toward its overall affirmance. Yet the Solicitor General professes to find nothing amiss in that opinion—indeed,

---

[12]App. B., p. 13; 350 F.2d at 206.

twice terms it "plainly correct"! [pp. 6, 8]. Petitioners most respectfully submit that the law is ill-served when the offices of the Highest Court's chief counsel, legal advisor above partisanship, and oft-termed "Tenth Member" of the Court, can so callously and unabashedly be turned to the willing demolition of the very landmark Act which his own Department most instrumentally and proudly helped bring to fruition.[13]

---

4. SVENSKA

We have already answered the Solicitor General's two superficial distinctions between the instant case and *Svenska,*[14] in our petition proper [Pet. pp.22-24].[15] All that is here needed is to retrieve the importance of this case from the footnoted obscurity to which the Brief in Opposition has relegated it, and to urge the Court, once again, to consider carefully the clear conflict presented in the petition.

---

[13]See, e.g., *Wong Yang Sung v. McGrath,* 339 U.S. 33, 38-40, 44 (1950); Attorney General's Manual on the Administrative Procedure Act, pp. 5-7 (1947).

[14]*Aktiebolaget Svenska Amerika Linien (Swedish-America Line) v. Federal Maritime Commission,* D.C. Cir. No. 18554 (June 10, 1965).

[15]However, regarding his first point, that Section 15 has no comparable language to 14b(9), it is perhaps worth observing that the very language from Senate Report 860 which the Solicitor himself quotes, two pages earlier, to support the supposed breadth of 14b(9), *conjoins it with Section 43,* which of course applies to the *whole* Act.

CONCLUSION

For the reasons set forth in the petition and amplified herein, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated December 6, 1965.

Respectfully submitted,

GRAHAM JAMES & ROLPH
LEONARD G. JAMES
ROBERT L. HARMON
F. CONGER FAWCETT
Attorneys for Petitioners